



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rix Industries, Inc.; Ingersoll-Rand Co.
File: B-225176.3; B-225176.4
Date: March 30, 1987

DIGEST

1. Claims for bid preparation costs and costs of filing and pursuing protests are denied where protests are dismissed because they have been rendered academic by changed agency requirements and the withdrawal of funding for the procurement.

2. Principle enunciated by the court in Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970), that the government has an implied-in-fact contract to fairly and honestly consider bids, provides no basis for recovery of the costs of filing and pursuing a protest. Keco stands only for the proposition that a claimant is entitled to recovery of its bid preparation costs if its bid is not fairly and honestly considered.

3. Where a solicitation has been canceled and the funding for the requirement withdrawn, the mere fact that the agency may at some point in the future find it necessary to acquire the items covered by the canceled solicitation, provides no basis to conclude that the protested solicitation has not been canceled unequivocally or that the agency has a current requirement for the equipment covered by the canceled solicitation.

DECISION

Rix Industries, Inc. and Ingersoll-Rand Co. claim recovery of their bid preparation costs under invitation for bids (IFB) No. N00024-86-B-4053 issued by the Department of the Navy for oil-free high pressure air compressors (HPACs). Ingersoll-Rand also seeks recovery of the costs of filing and pursuing its protest (B-225176.1) against the proposed award of the HPAC contract to Rix. In addition, both parties request reimbursement for the costs of filing and pursuing their protests against the Navy's subsequent cancellation of the

HPAC solicitation. We deny the claims as the underlying protests are now academic and will not be decided on the merits.

BACKGROUND

The Navy issued IFB No. N00024-86-R-4053 on January 17, 1986, seeking bids for 16 HPACs for base year 1986 with options to purchase 20-28 more HPACs in 1987, 28-36 more in 1988, and 6-14 more in 1989. The IFB provided that the options would be evaluated for award purposes.

Bid opening took place on May 28, 1986. Four bids were received, and Rix was determined to be the low bidder. Ingersoll-Rand, the second low bidder, filed a protest with the agency against the proposed award to Rix. Ingersoll-Rand primarily asserted that the IFB contained design specifications that required the HPACs to be of a "crankshaft" design. Ingersoll-Rand argued that Rix's bid was nonresponsive because it offered HPACs that were of a "swash plate" design. The agency denied Ingersoll-Rand's protest and found that Rix's bid was responsive because the IFB specifications were performance, not design, specifications.

Ingersoll-Rand subsequently filed a protest against the proposed award to Rix with our Office. The protest raised the same allegations as those asserted in Ingersoll-Rand's agency-level protest. In the course of preparing its report to our Office on this protest, the Navy determined that the IFB specifications were ambiguous and inadequate. The agency concluded that the solicitation should be canceled and the requirement resolicited under revised specifications which clearly would allow a variety of HPAC designs, including both crankshaft and swash plate designs.

The Navy's determination to cancel and resolicit was based in part on a conclusion that the IFB contained both performance and design specifications and, therefore, was open to conflicting interpretations. In addition, the Navy found that the spare parts list attached to the IFB might not be adequate to require delivery of the necessary spare parts if the agency accepted Rix's swash plate design. The Navy also concluded that both actual and potential bidders were prejudiced by the defects in the solicitation as they were not given an equal opportunity to compete for the Navy's true requirements. The solicitation was canceled on January 8, 1987.

Both Rix and Ingersoll-Rand protested the agency's cancellation of the IFB to our Office. Each protester contended that the IFB was not ambiguous, although each

interpreted the IFB differently. Rix also filed suit in the United States District Court for the Northern District of California (Civ. No. C-86-7283-DLJ) requesting declaratory and injunctive relief, and the court requested and advisory opinion from this Office.^{1/} At the request of the parties, we scheduled a conference at our Office on the merits of the protest. See GAO Bid Protest Regulations, 4 C.F.R. § 21.5 (1986). At the conference, the attorney representing the Navy advised the parties and our Office that they had just learned that the Navy no longer had a requirement for the 94 HPACs covered by the protested IFB, and that at most, any resolicitation would be for a quantity of ten. Further, the Navy advised that the funding for the requirement was no longer programmed. It is this revelation that gives rise to the parties' request that they be reimbursed for the costs of filing and pursuing their protest against the cancellation of the IFB.

The Navy states that of the 94 oil-free HPACs covered by the IFB, 84 were for installation on its FF1052 class ships as replacements for the oil-lubricated HPACs currently on those ships. This requirement was reevaluated and found to be inadvisable from a cost and technical standpoint, and the funding for the requirement therefore was withdrawn.

Specifically, between January and May 1986, concerns arose over the high cost of replacing the existing oil-lubricated HPACs, particularly because there were no known functional problems with them. However, because of safety concerns (chance of fire or explosion with oil-lubricated HPACs), and the possibility that the service life of the FF1052s might be extended from 30 to 40 years (which would necessitate replacing or upgrading the existing HPACs), the requirement was not changed. Subsequently, a Navy technical personnel learned that the fleet was experiencing problems with oil-free HPACs installed on other ships. This information, coupled with the original concern over the cost of replacing HPACs with no known problems, prompted the decision to withdraw the funding for the 84 oil-free HPACs for the FF1052 class. This occurred in October of 1986, and was accomplished by deleting this requirement from the Chief of Naval Operations (CNO) budget worksheet.

The Navy states that data from the CNO budget worksheet is fed at least three times a year into a computer data system, and this data is reviewed by Navy inventory managers at

^{1/} This lawsuit subsequently was dismissed pursuant to a stipulation of dismissal without prejudice, entered into by the parties to the suit on March 10, 1987.

monthly intervals, or on request. The inventory managers then forward any information concerning changed requirements to the contracting officer. In this case, the oil-free HPAC requirement was deleted from the data base on January 21, 1987. Although the Navy inventory managers learned on February 3, 1987, that this had happened, they did not advise the contracting officer because the solicitation for the oil-free HPACs had already been canceled due to the determination that the specifications were defective.

The Navy states that the contracting officer, as well as the Office of the General Counsel, actually became aware of the change in requirements on February 10, 1987, 1 day before the protest conference at our Office. On that date, Rix's attorney called the Navy Office of Counsel to inquire about a statement in the Navy's report to our Office on the Rix and Ingersoll-Rand protests. The statement in question was that the impact of the disclosure of the bid prices, as a result of the solicitation's cancellation, would be mitigated by the fact that the new solicitation would be for a different quantity of HPACs, due to revised fiscal year requirements. The Navy states that at the time it prepared the protest report, the contracting officer believed the resolicited requirement would be for 70-94 units. Due to the call from Rix's attorney, however, Navy counsel decided to verify the exact status of the requirement, and learned for the first time that funding for 84 of the HPACs originally solicited had been withdrawn.

Both Rix and Ingersoll-Rand contend that the agency's delay in advising the protesters of the change in requirement was inexcusable and caused them unnecessarily to incur substantial costs pursuing their protests of the solicitation cancellation. Accordingly, both protesters seek recovery of those costs, as well as the costs of preparing their bids. In addition, Ingersoll-Rand asserts that it is entitled to recover the costs of pursuing its earlier protest against the proposed award to Rix. In this connection, Ingersoll-Rand asserts that the Navy's cancellation of the solicitation constitutes an acknowledgment that Ingersoll-Rand was correct in its contention that Rix's bid was nonresponsive.

BID PREPARATION AND PROTEST COSTS

Our authority to allow the recovery of bid preparation costs and the costs of filing and pursuing a protest is predicated on a determination by our Office that a solicitation, proposed award, or award of a contract does not comply with a statute or regulation. 31 U.S.C. § 3554(c)(1) (Supp. III 1985). Where a protest becomes academic and we do not issue

a decision on the merits, there is no basis for the award of costs. Systems Management American Corp., B-224229, Nov. 10, 1986, 86-2 CPD ¶ 546. In this case, Rix and Ingersoll-Rand's protests against the cancellation of the solicitation have been rendered academic by the change in the agency's requirements and the withdrawal of the funding for the procurement. See Associates for Research and Training, Inc., B-220378, Jan. 17, 1986, 86-1 CPD ¶ 59.

The protesters contend, however, that they are entitled to recover their protest costs because the Navy negligently and unreasonably failed to notify them promptly that the requirement had changed and the funding had been withdrawn. In this connection, Rix asserts that an implied-in-fact contract to treat all bidders fairly and honestly arises under the procurement process, and argues that the Navy breached that contract here by failing to monitor the availability of funds and the status of the requirement. Rix asserts that it was improperly induced to incur the expense of filing and pursuing its protest against the solicitation cancellation because of the agency's failure to make an honest inquiry into its needs before canceling the IFB for other reasons and before responding to Rix's lawsuit and its protest to our Office. Rix notes that the agency continually represented that it intended to resolicit the requirement under revised specifications. --

In support of its theory that the Navy violated its implied-in-fact contract to treat all bidders fairly and honestly, Rix cites Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). Keco stands for the principle, established by the Court of Claims, that if a claimant's bid is not fairly and honestly considered, the claimant should be allowed to recover the costs of preparing its bid. See Bell & Howell Co., 54 Comp. Gen. 937 (1975), 75-1 CPD ¶ 273. Keco does not, however, provide any support for the proposition that a claimant may recover the costs of pursuing a protest. Id.; see T & H Co., 54 Comp. Gen. 1021 (1975), 75-1 CPD ¶ 345.

Further, as previously stated, our authority to award such costs is predicated on a determination that a solicitation, proposed award or award of a contract does not comply with a statute or regulation. Where, as here, a protest is against the cancellation of a solicitation, the relevant issue is the propriety of the reason for the cancellation. That issue is academic in this case because the solicitation could not be reinstated even if we sustained the protest since the requirement has changed and the funds have been withdrawn.

See Associates for Research and Training, Inc., B-220378, supra, 86-1 CPD ¶ 59. Accordingly, there is no legal basis for the recovery of the protesters' costs of filing and pursuing their protests. See Bru Construction Co., B-221383.2, May 27, 1986, 86-1 CPD ¶ 487.

Similarly, we also deny Rix's request for recovery of its bid preparation costs since there is no legal basis for the recovery of such costs where the underlying protest is academic. See Systems Management American Corp., B-224229, supra, 86-2 CPD ¶ 546. To the extent that Rix is arguing that it is entitled to recover its bid preparation costs under the Keco standard because the Navy violated its implied-in-fact contract to deal with Rix fairly and honestly, we find the argument unpersuasive. The agency actions of which Rix now complains, that is, its failure to monitor the status of the requirement and the availability of funds, may have caused Rix to incur the expenses of filing and pursuing a protest unnecessarily. They did not however, deprive Rix of a fair and honest consideration of its bid, or of a fair opportunity for award. Accordingly, they do not give rise to a successful claim for bid preparation expenses under Keco. See A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD ¶ 541.

We turn then to Ingersoll-Rand's contention that it is entitled to recover the costs of pursuing its earlier protest to our Office against the agency's proposed award to Rix, as well as its bid preparation expenses. Ingersoll-Rand asserts that the Navy's cancellation of the solicitation is an acknowledgment that Rix's bid was nonresponsive and that accepting the bid would have been contrary to statute or regulation. The protester also argues that had it not been for the Navy's action in treating Rix's nonresponsive bid as responsive, none of the expenses incurred in pursuing the protest would have been necessary.

At the outset, we note that the Navy in fact has not acknowledged that Rix's bid was nonresponsive. The Navy's asserted reason for canceling the solicitation was not that Ingersoll-Rand's protest had merit, but, primarily, that the specifications were ambiguous and did not provide an opportunity for equal competition. Under these circumstances, we do not consider the mere fact that the agency canceled the solicitation, after Ingersoll-Rand protested the award to Rix, adequate to demonstrate that the agency found the protest meritorious.

Moreover, we have denied the recovery of bid protest and preparation costs even where the agency admits that the protest has merit and takes corrective action, such as canceling the solicitation, which the protester does not challenge. See Care Hospital Supply, Inc., B-226002, Mar. 2, 1987, 87-1 CPD ¶ _____. The basis for denying recovery under those circumstances is that the agency's corrective action renders the protest academic. Id. In this case, Ingersoll-Rand did challenge the agency's cancellation of the solicitation; however, that protest has now become academic due to the agency's changed requirements and the withdrawal of the funding for the procurement. Accordingly, in the absence of any decision on the merits of either protest, there is no basis for award of costs. See Systems Management American Corp., B-224229, supra, 86-2 CPD ¶ 546.

We therefore deny Ingersoll-Rand's request for recovery of its bid preparation costs and the costs of pursuing its protest against the proposed award to Rix.

STATUS OF PROCUREMENT

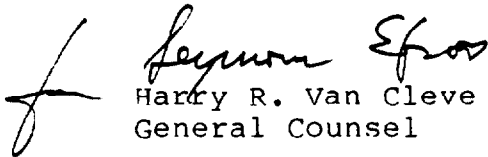
Rix also asserts that the status of the original procurement remains unclear and that the Navy's equivocation in this regard reflects its failure to conduct this procurement honestly and fairly. In this connection, Rix asserts that the Navy has not "unequivocally" canceled the solicitation since it has stated that replacement of the HPACs for the FF1052 class ships may become necessary in the future if the service life of the ships is extended. Rix argues that it would be extremely unfair if the Navy were to decide later that it will purchase the HPACs.

We find Rix's characterization of the status of the procurement to be inaccurate. The record shows that the solicitation for the HPACs which Rix competed under has in fact been canceled. Further, the record shows that the funds for the HPACs that were to be installed in the FF1052 class ships are no longer programmed. Although the Navy does state that the SHIPALT for the HPACs has not been canceled, the Navy also states that the SHIPALT is simply a document that discusses an improvement that is proposed for a ship or class of ships. The SHIPALT cannot be carried out, however, if, as in this case, there are no funds programmed for its accomplishment. In fact, the Navy itself states that if at some time in the future the service life of the FF1052 class is extended the SHIPALT can be reprogrammed, or funded, at that time.

Accordingly, the mere fact that the SHIPALT has not been canceled does not indicate that the agency still has a current requirement for the HPACs, or that the agency has not unequivocally canceled the protested solicitation.

CONCLUSION

We dismiss the protests because they have been rendered academic by the change in the agency's requirements for the solicited equipment and the withdrawal of the funds for the procurement. In addition, we deny the protesters' requests for payment of protest costs and bid preparation costs.


Harry R. Van Cleve
General Counsel